sciendo

ICLR, 2022, Vol. 22, No. 1.

Draft Legally Binding Instrument on Business and Human Rights – Is UN Stepping Twice into the Same River?

Amal Azem Gealfow

*École doctor*ale de droit de la Sorbonne, Paris I
Panthéon-Sorbonne University, France

&

Ivana Machonova Schellongova[1]

Webster University in Geneva, Switzerland

AZEM GEALFOW, Amal; MACHONOVA SCHELLONGOVA, Ivana. Draft Legally Binding Instrument on Business and Human Rights – Is UN Stepping Twice into the Same River?. *International and Comparative Law Review*, 2022, vol. 22, no. 1, pp. 149–164. DOI: 10.2478/iclr-2022-0010

Summary: Discussions of preventing and addressing adverse impact of business activities on human rights have occupied international community at least for the last fifty years. This article discusses successes and failures of past attempts, a state of play of negotiating legally binding instrument and alternative approaches to the current path. It suggests that the way forward for a successful treaty on business and human rights is maintaining key objectives of the draft, namely access to remedy and justice for victims of corporate abuses, balanced with cross regional support among States. Alternative approaches may be worth exploring if they would promise of delivering this balance. In this context, a new group of friends may contribute to changing of dynamics of discussions and mindsets of key players.

Keywords: international treaty, business and human rights, access to remedy and justice

1 Regulating business and human rights: an old tale

At its inception, international human rights law intended for States to be the sole duty-bearers of human rights obligations. Nevertheless, the Universal Declaration of Human Rights[2] does not excuse other legal persons deviating from the standard of behavior it sets out and thus, does not exclude them explicitly.[3]

1 Autor serves as a Human Rights Officer in the Office of the High Commissioner for Human Rights in Geneva. The views expressed in this article are solely those of the author and cannot be attributed to any of the above-mentioned institutions.

2 United Nations, *Universal Declaration of Human Rights*, 1948.

3 Article 30 of the *Universal Declaration of Human Rights* suggests the opposite by stating an obligation *"for any State, group, or person"* to withhold from any activity or act aimed at the destruction of any of the rights and freedoms set forth.

Published by Palacký University Olomouc, Czech Republic, 2022.
ISSN (print): 1213-8770; ISSN (online): 2464-6601

A purposive approach to this founding document shows that even at that time, States were concerned with non-states actors' human rights' violations. Businesses were singled out by some delegations that voiced their concern with the threat that 'high finance' entailed to human rights, without opposition from Western delegations.[4]

Shortly after the completion of the International Bill of Rights,[5] the first global attempt to regulate businesses was made by the negotiations around the failed Code of Conduct on Transnational Corporations (1). While similar regional efforts were carried out in the meantime,[6] it is only at the beginning of the millennium that a new global initiative resurfaces with the UN Global Compact (2). A far more ambitious regulatory process was initiated within the United Nations Sub-Commission on the Promotions and Protection of Human Rights, resulting in the draft Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights (3). A document later rejected by the Human Rights Commission as having 'no legal standing'.[7] The penultimate UN initiative was met with more enthusiasm leading to the unanimous adoption by the Human Rights Council of the 'Protect, Respect and Remedy Framework' as the UN Guiding Principles on Business and Human Rights (4).

1.1 The Draft Code of Conduct on Transnational Corporations

The seventies witnessed the emergence of a public awareness '*in the developed world about the adverse impacts of Western corporations in the developing world*'.[8] As a result, the UN Economic and Social Council established the UN Commission on Transnational Corporations (hereinafter UNCTC), an intergovernmental body composed of '*forty-eight member States to serve as a forum within the UN system for the comprehensive and in-depth consideration of issues relating to transnational corporations.*'[9] A second body, the UN Centre on Transnational

4 BERNAZ, Nadia, *Business and Human Rights. History, Law and Policy – Bridging the Accountability Gap:* Routledge, 2017, pp. 81–83.

5 The Universal Declaration of Human Rights, International Covenant on Economic, Social and Cultural Rights and International Covenant on Civil and Political Rights.

6 Amongst those efforts, two initiatives stand out; the *OECD Guidelines for Multinational Enterprises* that gained in sophistication throughout the years and *the Decision 24 of the Commission of the Cartagena Agreement* that sets out a Common regime of treatment of Foreign Capital and of Trademarks, Patents, Licenses, and Royalties in the Latin American with a limited success.

7 ECOSOC Decision 2004/279, *Responsibilities of transnational corporations and related business enterprises with regard to human rights*, 2004, https://www.un.org/en/ecosoc/docs/2004/decision%202004-279.pdf.

8 BERNAZ, Nadia, op. cit., pp.164.

9 URIBE Daniel, DANISH, *Designing an International Legally Binding Instrument on Business and Human Rights*, South Center, July 2020, [online]. Available at: https://www.southcentre.int/sc-publication-july-2020/#more-14658

Published by Palacký University Olomouc, Czech Republic, 2022.
ISSN (print): 1213-8770; ISSN (online): 2464-6601

Corporations, was founded to provide technical support for the UNCTC in the venture of elaborating a Code of Conduct on Transnational Corporations.[10] Early on, disparities between the developing and developed countries appeared. The former called for *'controlling TNCs'*, while the latter wished to *'legitimize TNC's'* and *'tame'* them through legal means.[11]

A Draft Code of Conduct on Transnational Corporations was proposed by the UNCTC in 1982 and its provisions did not shy away from difficult subjects. The Code presented a set of innovative options, such as operationalizing and widening international agreements in new fields of transnational activities, hence avoiding duplication.[12] It discussed transnational corporations' adherence to economic and development goals, socio-cultural objectives and respect for human rights and freedoms. It also comprised political stances such opposing Apartheid in South Africa as well as a monitoring mechanism based on States' reporting of business activities.

The Developed States divested their interest from the project toward International Investment Agreements and elaborated binding standards of treatment to protect their investments, including within developing countries.[13] The ambitious yet competing attempt of the Draft Code of Conduct to similarly regulate States' treatment of foreign investors contributed to its collapse as its latest version was rendered obsolete by the newly formed investment regime.[14]

The Draft Code of Conduct was definitively abandoned in 1992 and by the end the nineties, two brand-new regulatory initiatives were formulated mirroring the two different approaches to regulating TNCs – a voluntarist approach with the UN Global Compact supported by the Western countries and the legalistic approach sponsored by the Southern States with the Draft UN Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises.

1.2 *The UN Global Compact*

The UN Global Compact is a soft law framework, launched with the stated goal to *give a human face to the global market* and an underlaying purpose of pacifying the relations between the United Nations and the private sector post-

10 Ibid.

11 SAUVANT, Karl P. The Negotiations of the United Nations Code of Conduct on Transnational Corporations. *The Journal of World Investment and Trade*, 2015, no. 16, pp. 17.

12 These proposals were phrased in Article 1 and Article 20 of the Code of Conduct. Despite the broadness of the wording, one can notice the similarity with the Multilateral Convention to Implement Tax Treaty Related measures to Prevent Base Erosion and Profit Shifting, a highly technical tool that aims to modify existing bilateral tax agreements. It also echoes similar proposals to use the Legally Binding Instrument as a tool to modify and operationalize existing human rights conventions in the field of business and human rights.

13 URIBE Daniel, DANISH, op. cit.,

14 BERNAZ, Nadia, op. cit., pp. 174.

Published by Palacký University Olomouc, Czech Republic, 2022.
ISSN (print): 1213-8770; ISSN (online): 2464-6601

cold-war era. The project was initiated by the call to businesses of the former UN Secretary-General, Kofi Annan, during the 2000 World Economic Forum in Davos.[15] It marked the beginning of a trend of institutionalization of the relationships between the United Nation and the private sector and a shift of position of the former toward the latter from a relative neutrality to a partnership building.

The Global Compact rests on ten principles pertaining to four mains areas: human rights, labor, environment, and anti-corruption. While all pillars encompass human rights issues, the two first principals require businesses to support and respect human rights and to prevent any complicity in their abuse. These soft obligations are subject to a reporting mechanism, namely an annual submission of Communication on Progress to which businesses commit and, a monitoring mechanism carried out by this initiative. Adopting a 'name and shame' method, companies that cease to comply with their commitment are listed as 'non-communicating' or even 'expelled'. The Global Compact also includes 'an embryonic'[16] Grievance Mechanism which aims to mediate disputes and facilitate their resolution. Companies can easily join the Global Compact by submitting a letter signed by their CEO and addressed to the UN Secretary-General, committing to implement the ten principles. A financial contribution is required and calculated based on the gross annual revenue of the company. The contribution is received by the Foundation for the Global Compact, incorporated under the laws of New York State as a not-for-profit corporation that 'qualifies for maximum charitable contribution deductions by donors where applicable'.[17]

The Global Compact stands out in the global intergovernmental arena by the lack of States' involvement in its functioning, despite the call of the Group of 77 – the coalition of developing states within the UN – requesting a strengthened governmental control as well as rules of engagement with the private sector.[18] That reflects the controversial and opposing regulatory approaches and explains the persistence of the critics to the initiative.[19] On the one hand, the Global Com-

15 UN Press Release SG/SM/6881. Secretary-General proposes global compact on human rights, labour, environment, in address to World Economic Forum in Davos. 1 February 1999. [online]. Available at: <https://www.un.org/press/en/1999/19990201.sgsm6881.html> accessed 21.03.2022.

16 BERNAZ, Nadia, op. cit., pp. 179.

17 United Nations Global Compact, *Our finances*. [online]. Available at: <https://www.unglobalcompact.org/about/finances> accessed 21.03.2022.

18 Group of 77, *Comment on behalf of the Group of 77 and China by Ambassador Byron Blake, Deputy Permanent Representative of Jamaica to the United Nations, at the session of the second committee of the General Assembly on "the role of the private sector in achieving the MDGs", New York, 17 November 2005*. [online]. Available at: <http://www.g77.org/Speeches/111705.htm> Accessed: 27.03.2022.

19 HAMM, Brigitte. The Struggle for Legitimacy in Business and Human Rights Regulation—a Consideration of the Processes Leading to the UN Guiding Principles and an International Treaty. Human Rights Review, 2021. vol. 23. no. 1. https://doi.org/10.1007/s12142-020-00612-y.

Published by Palacký University Olomouc, Czech Republic, 2022.
ISSN (print): 1213-8770; ISSN (online): 2464-6601

pact translates the voluntarist approach advocated by Kofi Annan and Western States that aimed for a learning platform and exchange of good practices; on the other hand, it highlights the schism with the global South that vows for explicit hard norms.[20] The second trend materialized in 1998 by the former UN Sub-Commission on the Promotion and Protection of Human Rights assigning a *Sessional Working Group on the Working Methods and Activities of Transnational Corporations* to elaborate a set of international human rights obligations for TNCs.

1.3 Draft Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights

The *Draft Norms on the Responsibilities of Transnational Corporations*[21] (hereinafter the Norms) were adopted by the UN Sub-Commission in 2003, only to be widely rejected by its parent body, the UN Commission on Human Rights the following year.

Overcompensating the voluntarism of the Global Compact, the Norms presented an ambitious proposal, starting with the idea that businesses are duty-bearers of human rights obligations. Referring to the preamble of the Universal Declaration of Human Rights,[22] the Norms considers TNCs and other business enterprises as 'organs of society', therefore bearing similar obligation, not only to 'respect' but, '*to promote, secure the fulfilment of, respect, ensure respect of and protect human rights recognized in international as well as national law*'. Based on this assumption, the Sub-Commission proposed a set of obligations for businesses mirroring international obligations of States in multiples areas, ranging from non-discrimination to environmental protection.

Beyond the scope of its articles, the Norms' failure is due to unwillingness of its opponents to discuss or negotiate the proposal as *'conflicting views immediately yielded two hostile blocs'*: civil society strongly supporting the Norms and the private sector vehemently opposing them, alongside Western delegations.[23]

The Norms still had an important impact on the Business and Human Rights field as they ignited the next global regulatory project. Indeed, within the same

20 BERNAZ, Nadia, op. cit., pp. 176–184. It is relevant to consider that the nature of UN Global Compact is, in itself, a conflictual point as Western countries consider the initiative to be a tool of learning and governance while Surya Deva, a TWAIL scholar, disagrees and considers the Global Compact to be a regulatory framework that allows for blue washing.

21 UN Economic and Social Council, E/CN.4/Sub.2/2003/12/Rev.2, 26 August 2003.

22 For reminder, the Universal Declaration of Human Rights proclaims itself to *be 'a common standard of achievement for all peoples and all nations, to the end that every individual and every* ***organ of society****… shall strive by teaching and education to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance, both among the peoples of Member States themselves and among the peoples of territories under their jurisdiction'*.

23 HAMM, Brigitte, op. cit. pp. 9.

Published by Palacký University Olomouc, Czech Republic, 2022.
ISSN (print): 1213-8770; ISSN (online): 2464-6601

decision stating their dismissal, the Commission on Human Rights requested the UN Office of the High Commissioner for Human Rights to report on the initiatives relating to corporate responsibility and human rights.

Acting upon the delivered report,[24] which maintained the Norms for consideration, the UN Secretary-General appointed a Special Representative, Harvard Professor John Ruggie, to further the work on a regulatory instrument for business in human rights. Ultimately, Ruggie opted to abandon all references to the Norms to appease the different stakeholders and transcend the schism between their proponents and opponents. A winning bet as it led to the adoption of the UN Guiding Principles on Business and Human Rights (hereinafter the UNGPs or the Guiding Principles).

1.4 The UN Guiding Principles on Business and Human Rights

As the UN Secretary-General Special Representative inherited a hostile work environment amongst two seemingly irreconcilable stands, the voluntarists that favored soft law instruments and partnership building with the private sector, and the legalists calling for hard norms to be imposed on the latter.

The five years so-called 'Ruggie process' led to the elaboration of the 'Protect, Respect and Remedy Framework', also known as the Ruggie Principles. In 2011, these principles were *endorsed* unanimously by the Human Rights Council to become the UN Guiding Principles on Business and Human Rights. This endorsement makes of the UNGPs a unique milestone as it is the sole instrument that gathered a bipartisan support.

The main argument cited to justify the wide acceptance of the UNGPs is the polycentric governance approach on which they are based and that characterizes the project, in Ruggie' words, as one of '*principled pragmatism*'.[25] First, Ruggie identified three complex clusters for corporate social responsibility, i.e., public governance of the public sector, civil governance for the civil society, and corporate governance for the private sector. Then, he conceptualized that all three clusters needed to be mobilized to ensure business' compliance with a narrowed duty to Respect, alongside the State responsibility to Protect and a shared responsibility to Remedy human rights' abuse.[26] The distance created between the States'

24 United Nations High Commissioner. *Report of on Human Rights on the responsibilities of transnational corporations and related business enterprises with regard to human rights*. E/CN.4/2005/91, 15 February 2005, pp. 18.

25 MARES, Radu. *Three baselines for business and human rights*. 2017. [online]. Available at: <https://lucris.lub.lu.se/ws/portalfiles/portal/34400601/Three_baselines_for_business_and_human_rights.pdf> Accessed: 22.03.2022.

26 For an in-depth analysis, see BECKERS, Anna. From Corporate Personality to Corporate Governance. The Transformation of International Human Rights Protection in Corporate Governance Structures. BHUTA Nehal, VALLEJO Rodrigo (eds). *Human Rights and Global Governance*. Oxford University Press, Oxford, 2020. Also [online]. Available at: <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3573755>.

Published by Palacký University Olomouc, Czech Republic, 2022.
ISSN (print): 1213-8770; ISSN (online): 2464-6601

obligations and the private sector's obligations is considered amongst the greater strengths of the framework as it allows for a dialogue without constantly questioning the progress made by either group.[27]

Another factor in the success of this initiative was a renewed willingness of the private sector to take part in the discussions that materialized in their strong participation in the Framework process. Ruggie's profile has certainly facilitated this participation by reassuring the business sector. As an expert, he was close to policymakers, NGO's and business leaders, given his role of being one the architects of the Global Compact.[28] Neither reservations raised amongst the civil society organizations,[29] nor the harsh critic by the Norms' writer on Ruggie's choice to ignore them,[30] have had any substantive effect on the work of the Special Representative.

Since their adoption, an important effort has gone into operationalizing the UNGPs, comforting their importance in the field. Hence, the articulation between the UNGPs and the Legally Binding Instrument[31] (hereinafter LBI) is of the utmost significance as it also contributes to define the latter's purpose. Although the Guiding Principles smoothened the ideological disparities between Northern and Southern countries, they did not manage to get rid of the wish for harder obligations on businesses. Many feared that the Principles were ill equipped to effectively bridge the persistent accountability gap and even saw in them an expression of business regulatory capture.[32]

These critics of multiple origins – Global South, International Law experts and the civil society – are substantiated. While acknowledging the important progress induced by the UNGPs, its National Actions Plans still carry important weaknesses and shortcomings.[33] Furthermore, national legislative projects are growing in number as public awareness keeps raising.[34]

---

27 BERNAZ, Nadia, op. cit., pp. 192–193.

28 HAMM, Brigitte, op. cit., pp. 10.

29 Ibid.

30 David Weissbrodt, denouncing a counterproductive approach inspired if not copy from the private sector lobby in WEISSBRODT, David. UN Perspectives on "Business and Humanitarian and Human Rights Obligations". *Proceedings of the ASIL Annual Meeting*, vol. 100, 2006, pp. 135–139. DOI: https://doi.org/10.1017/S027250370002406X.

31 OHCHR. Legally Binding Instrument to Regulate, In International Human Rights Law, The Activities of Transnational Corporations and Other Business Enterprises. All official documents [online]. Available at: <https://www.ohchr.org/en/hr-bodies/hrc/wg-transcorp/igwg-on-tnc>.

32 HAMM, Brigitte, op. cit. pp. 14.

33 O'BRIEN METHVEN Claire, FERGUSON John , MCVEY Marisa. National Action Plans on Business and Human Rights: an Experimentalist Governance Analysis. *Human Rights Review,* 2021. https://doi.org/10.1007/s12142-021-00637-x.

34 Since the launch of the LBI initiative, multiples tragedies have sparked outrage among the wide public. The pioneering French law no 2017-399 of 27.03.2017 'relative au devoir de vigilance' – on corporate duty of vigilance – has been coined as the Rana Plaza Law after

Published by Palacký University Olomouc, Czech Republic, 2022.
ISSN (print): 1213-8770; ISSN (online): 2464-6601

Nevertheless, the UNGPs allow to transcend the appearance of their opposition to the LBI. Although the former was seen as an alternative to the legalistic Norms, it still frames '*the business and human rights fields in a sufficiently broad and evolutionary way, Ruggie's approach left space for further legalization*'[35]. A process that the Principles called upon as they urged to adopt '*a smart mix of measures – national and international, mandatory, and voluntary – to foster business respect for human rights*'.[36]

2 Draft Legally Binding Instrument: the state of play

Discussing the newly voted resolution establishing the will to elaborate a Legally Binding Instrument, Ruggie wrote an article titled "*The Past as Prologue?*".[37] The LBI is indeed an omen of the persistence of a North-South divide, even at its weakest level. Many scholars argue that the UNGPs gathered a weak approval only, as they were merely 'endorsed' to reach a *virtual* consensus, knowing that an eventual vote would have revealed the opposition of the Global-South countries that voiced publicly or privately their discontent.[38]

Therefore, it should come as a no surprise that Ecuador and South-Africa initiated the process for a binding treaty by the adoption, on 26 June 2014, of the resolution 26/9 '*to establish an open-ended intergovernmental working group … to elaborate an international legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises*.' This mandate reflects both the legal ideology of the initiators and their realism when it comes to the feasibility of the project as they established an open-ended group, i.e., without a set end date. The resolution was adopted after a divisive vote and seven working sessions were held since 2015 amounting to the current Third Draft of the LBI.

Right away, Ruggie sharply summed up the conditions of success of such undertaking as he stated, "*in the heat of the moment, treaty advocates, and oppo-*

the disastrous 2013 Dhaka garment factory collapse. More recently, multiples stakeholders kept updated lists on businesses implicated in Uyghur forced labor and possibly complicit of their genocide. A similar process is being carried out with companies' behavior in the context of Russia unlawful invasion of Ukraine.

35 MARES, Radu. op. cit., pp. 7.

36 Commentary of the Article 3 of the OHCHR, Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework", 2011.

37 RUGGIE, John G. The Past as Prologue? A Moment of Truth for UN Business and Human Rights Treaty. 08 July 2014. [online]. Available at: <https://www.hks.harvard.edu/sites/default/files/centers/mrcbg/programs/cri/files/Treaty_Final.pdf>.

38 LÓPEZ, Carlos. The 'Ruggie process': from legal obligations to corporate social responsibility? Also, DEVA, Surya. Treating human rights lightly: a critique of the consensus rhetoric and the language employed by the Guiding Principles. In DEVA Surya, BILCHITZ David (eds). *Human Rights Obligations of Business: Beyond the Corporate Responsibility to Respect?* Cambridge, Cambridge University Press, 2013, pp. 58–77 and pp. 78–104.

Published by Palacký University Olomouc, Czech Republic, 2022.
ISSN (print): 1213-8770; ISSN (online): 2464-6601

nents seem to be on a collision course. Going forward, the answer hinges on whether the initiative's supporters are more interested in making a difference than in making a point, and whether its opponents can accept that some form of further international legalization in business and human rights is both necessary and desirable."[39]

As of now, different stakeholders are slowly coming to term with these conditions, and it may appear that a thin will for a compromise might be emerging. Despite an absence of the Western representatives during the first rounds of negotiation, the intergovernmental group has worked to include the proposals submitted by different stakeholders through a process praised for its inclusiveness.[40] Ultimately, both the European Union and the United States changed their position and started taking part in the LBI process, although in a very limited way so far. Notably, the EU is moving forward with its own regulatory efforts. On 23 February 2022, the European Commission adopted a proposal for a Directive on corporate sustainability due diligence, making a point that such "*intervention can ensure a strong European voice in policy developments at the global level*", solely and explicitly referring to the LBI in the footnote.[41]

Broadly put, the LBI aims at operationalizing and legalizing human rights in business practices of transnational character and bridging the accountability gap. Still, the purpose of the third draft treaty, stated in its second article, reflect its ideological foundation.[42] Access to remedy and justice – which is a human right itself – is at the center of the document with an emphasize on the protection of the claimant. The draft text further presents a set of expected business conducts, whether it is prevention through human rights due diligence or by setting a legal liability of businesses, and different jurisdictional aspects such as judicial cooperation amongst states and oversight mechanisms to ensure the enforceability of the human rights standards.

On the substance, the Draft LBI follows the UNGPs and their framework. The process in the making can be described as the hardening of these norms, which is a necessary step for an effective judicialization as States would be required to adopt national mechanisms to ensure compliance with due diligence requirements. The provision on legal liability is more innovative as it requires the adoption of national legal regimes that holds businesses liable for human rights violations, even if need be to pierce the corporate veil and engage the respon-

39 RUGGIE, John G. op. cit., pp. 8.

40 MARES, Radu. The United Nations Draft Treaty on Business and Human Rights. Forthcoming in MARX, VAN CALSTER, WOUTERS (eds), *Research Handbook on Global Governance, Business and Human Rights* (Edward Elgar, 2022). http://dx.doi.org/10.2139/ssrn.3964852.

41 EUROPEAN COMMISSION. *COM (2022) 71. Proposal for a Directive of The European Parliament and of The Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937*.

42 For a full analysis of the LBI's purpose, see MARES, Radu. The United Nations Draft Treaty on Business and Human Rights. op. cit., pp. 3–9.

Published by Palacký University Olomouc, Czech Republic, 2022.
ISSN (print): 1213-8770; ISSN (online): 2464-6601

sibility of a parent company, for the actions or omissions, of natural and legal persons under its control.

Technical aspects of the access to remedy are also covered, notably the applicable law, the adjudicative jurisdiction subjected to international private law, the statute of limitations aiming to ensure access to remedy in cases of serious violations and/or in case of complex and multifocal violation and/or a late discovery of the offense and finally, the possibility of reversing the burden of proof.

As to the monitoring mechanism, the draft treaty follows a "classical" human rights treaty approach with some innovations. It suggests a threefold monitoring mechanism – a committee, a fund for victims and a conference of States parties. Suggested functions of the committee include providing recommendations following consideration of States parties' reports and issuing general comments on interpretation of the treaty. For the time being, the proposal does not contain individual complaints or inquiry procedures, e.g. to decide upon individual cases or investigate gross and systematic violations of the treaty. These functions may be considered for future optional protocols,[43] as has been the case of other treaties. It may be noted, however, that the current "reporting fatigue" by States and the calls for more streamlined reporting processes may question the creation of a new monitoring body.

Secondly, the proposed fund is expected to provide legal and financial aid to victims seeking access to remedies. While being a noble idea, it may face practical constrains. So far, there is only one functioning fund established by a human rights treaty – a Special Fund of the Optional Protocol to the Convention against Torture. A trust fund envisaged by the Optional Protocol to the Covenant on Economic, Social and Cultural Rights has never been put in practice. Both funds have been envisaged as a technical assistance to States. On the other hand, the fund proposed by the draft treaty aims at direct victims' support. In this sense, it resembles the existing OHCHR Humanitarian Funds – for victims of torture and for victims of slavery – established by the General Assembly resolutions. Both provide financial grants to non-governmental organizations providing first-hand assistance to victims on the ground. None of these funds provides a direct legal assistance. Such assistance would require additional significant human and financial resources for the Secretariat of OHCHR, therefore essential political will to finance such an enterprise.

Thirdly, a Conference of States Parties is suggested as a means for parties to the treaty to consider any matter concerning the implementation of the treaty. Interaction and relationship between this body and an independent, expert Committee would require further clarification. It may be premature to analyse in detail the suggested monitoring mechanism at this stage, however, it would

43 There was a suggestion of an optional protocol for a complaint procedure in 2018 but this path was not pursued yet.

Published by Palacký University Olomouc, Czech Republic, 2022.
ISSN (print): 1213-8770; ISSN (online): 2464-6601

necessitate further considerations and adjustments if the current path of a treaty is being pursued.

Many scholars praise the engineering behind the Draft LBI.[44] They argue that the instrument succeeds in mobilizing mechanisms that would trigger national regulations and link them to existing business and human rights treaties. Thus, it creates a network combining both soft and hard norms, in a transnational setting that is crucial to solve a transnational problem. Still, contentious issues are yet to be resolved, especially when it comes to the scope of the treaty, i.e., defining the legal entities to which the provisions would apply. This raises the divisive issue of extraterritoriality that creates a new divide between scholars and the civil society that are in its favor while it is opposed by multiples States.[45]

The strong conceptual choices of the Draft LBI similarly fuel criticism towards it. Critics are twofold: concerns on its efficacity based on the substance of its articles and opposition to the form of the draft.[46] On the latter, both States delegates and academics question the political viability of an *overarching* instrument that would ultimately fail to satisfy all stakeholders.[47] They propose to switch toward an alternative approach, mainly one of a framework convention.

3 A Call for alternative approaches: a framework convention

Increasingly, and in particular in the last session of the intergovernmental working group, several delegations voiced their preference for an alternative approach to the current treaty draft. More specifically, the United States delegation, who participated for the first time, suggested exploring alternative instruments, such as *'legally binding framework agreement'* that would build on the UNGPs and reflect principles broadly supported by businesses, the civil society and other relevant stakeholders.[48] Similarly, the EU suggested, *'rethinking the*

44 BERNAZ Nadia. Clearer, Stronger, *Better? – Unpacking the 2019 Draft Business and Human Rights Treaty*. 2019. [online]. Available at: <http://rightsasusual.com/?p=1339>; PETERS Anne, GLESS Sabine, THOMALE Chris, WELLER Marc-Philipe. *Business and Human Rights: Making the Legally Binding Instrument Work In Public, Private And Criminal Law.* MPIL Research Paper Series no. 2020-06; KRAJEWSKI Markus. *Analysis of the Third Draft of the UN Treaty on Business and Human Rights Prof.* October 2021. CISDE. [online]. Available at: <https://www.cidse.org/2021/10/20/analysis-of-the-third-draft-of-the-un-treaty-on-business-and-human-rights/>.

45 MARES, Radu. The United Nations Draft Treaty… op. cit., pp. 6–8.

46 For an in-depth analysis article by article of the Third Draft LBI, see KRAJEWSKI, Markus. op. cit.

47 O'BRIEN METHVEN, Claire. *The 2020 Draft UN Business and Human Rights Treaty– Steady Progress Towards Historic Failure*. BHR Symposium, International Commission of Jurists. 2020. [online]. Available at: <http://opiniojuris.org/2020/09/11/bhr-symposium-the-2020-draft-un-business-and-human-rights-treaty-steady-progress-towards-historic-failure/>.

48 Human Rights Council. Annex to the report on the seventh session of the open-ended intergovernmental working group on transnational corporations and other business enter-

Published by Palacký University Olomouc, Czech Republic, 2022.
ISSN (print): 1213-8770; ISSN (online): 2464-6601

approach what should be core provisions of this instrument'.[49] Japan also stated *'the current approach is not ideal to achieve our common goals of promoting and protecting human rights in the context of business activities'*[50] referring to the US initiative addressing these issues. In a similar vein, the International Chamber of Commerce (ICC), representing 45 million companies worldwide, had also advocated for *'alternative approaches'* while reiterating its concern with the current methodology of the negotiations.[51] A proposal of a framework convention was also submitted to the working group by Claire O'Brien Methven, Strategic Adviser of the Danish Institute for Human Rights[52], and has been discussed, to a limited extend, in academic articles.[53]

What is a different about a framework convention comparing to a 'typical' human rights treaty? A framework convention is a legally binding instrument under international law. However, it stipulates obligations of States Parties in a way of objectives, general obligations and measures of implementation, in legislation, policy or practice, leaving to States wide margin of appreciation concerning the means and speed of implementation. A framework convention is inherently flexible, allowing States Parties the discretion of how to achieve the agreed objectives based on their countries' capabilities. In very simple terms, it has been described as a hard law instrument with a soft law content.[54] As mentioned by the Council of Europe with reference to the Framework Convention for the Protection of National Minorities, *'the word "Framework" highlights the scope for member states to translate the Convention's provisions to their specific country situation through national legislation and appropriate governmental policies'*.[55] Indeed, Council of Europe Framework Convention for the Protection of National Minorities as well as from WHO Framework Convention on Tobacco

prises with respect to human rights (A/HRC/49/65). Available at: <https://www.ohchr.org/EN/HRBodies/HRC/WGTransCorp/Session7/Pages/Session7.aspx > under Annex with the compilation of the general statements from States and other relevant stakeholders, pp. 25.

49 Ibid, pp. 27.

50 Ibid, pp. 14.

51 Ibid, pp. 28–29.

52 O'BRIEN METHVEN, Claire. Submission to UN Open-ended Inter-Governmental Working Group on Transnational Corporations and Other Business Enterprises with Respect to Human Rights, For a business and human rights treaty based on progressive national implementation of the UNGPs and modelled after WHO Framework Convention on Tobacco Control.

53 DE SCHUTTER, Olivier. Towards a New Treaty on Business and Human Rights. *Business and Human Rights Journal*, 2016, vol 1, no. 1, pp. 41–67. DOI: https://doi.org/10.1017/bhj.2015.5.

54 SIATITSA, Ilia Maria. The Evolution of the Monitoring Mechanism of the Framework Convention for the Protection of National Minorities: Co-operation of Independent and Political Bodies in the Interest of Effectiveness. *Revue Hellénique de Droit International*, 2010, Vol. 63, 771.

55 Framework Convention for the Protection of National Minorities (ETS No. 157), entered into force on 1 February 1998. [online]. Available at: <https://rm.coe.int/168007cdac>.

Published by Palacký University Olomouc, Czech Republic, 2022.
ISSN (print): 1213-8770; ISSN (online): 2464-6601

Control[56] can be considered as an inspiration for a framework convention on business and human rights.[57]

A framework convention could be an effective model of establishing a coherent treaty regime based on a general overarching agreement. It reflects the decision of the Parties to establish general obligations, create basic institutional arrangements, and provide procedures for the adoption of detailed obligations in subsequent protocols and/or leave room for stricter standards and implementation of the measures in national legislation.[58] The advantage is that the parties can more easily achieve a consensus as first they agree on general and basic principles, which could guide, if the parties wish so, the possible further negotiation of detailed and targeted protocols to such treaty.

To balance generality of provisions and margin of appreciation of State parties, framework conventions are equipped with a robust follow-up and reporting that is more demanding than a usual human rights treaty reporting process. Such monitoring has considerable budgetary implications that may present an obstacle for a broader support of a similar system at the universal level, and a feasibility for a framework convention in general. Monitoring of WHO Framework Convention required an establishment of a completely new secretariat (currently composed of 29 persons) that is a liaison and support for the Conference of States Parties. States Parties report every two years on the implementation of the Convention to the Conference of States Parties for a review of the implementation of the Convention internationally. The Conference does not provide specific recommendations per country. However, following consultations with States and other stakeholders, the Conference adopts detailed guidelines on the Convention's articles to assist States in implementation of the provisions of the Convention. The Council of Europe Framework Convention is monitored by an advisory group that is supported by a secretariat. A review process includes not only consideration of a periodic report submitted every five years but also *in situ* visit. Following the visit, the advisory group issues an opinion, and following comments by a State Party, a resolution with specific recommendations. The advisory group also considers information from other sources, including civil society organizations. This type of monitoring is closer to the current human rights treaty monitoring system whereas a constructive dialogue in Geneva is

56 WHO Framework Convention on Tobacco Control, entered into force on 27 February 2005.

57 Another example is the United Nations Framework Convention on Climate Change (1994). Framework conventions enjoy high rate of ratifications. There are 197 State parties to the Convention on Climate Change and 182 State parties to the WHO Convention on Tobacco Control.

58 Economic Commission for Europe, Framework Convention Concept (2011). [online]. Available at: <https://unece.org/fileadmin/DAM/hlm/sessions/docs2011/informal.notice.5.pdf>.

Published by Palacký University Olomouc, Czech Republic, 2022.
ISSN (print): 1213-8770; ISSN (online): 2464-6601

replaced by a visit including several meetings and discussions with authorities and other stakeholders.

Other arguments in support of a framework convention include chiefly its potential political acceptance by States that expressed reluctance vis-a-vis the Legally Binding Instrument. Even participating States to the negotiations have criticized the latest draft for being too prescriptive while stressing out the necessity of reaching an important support across regions. This new design convention holds the ability to bring opposing parties closer to each other as the number of conflictual issues would be reduced by respecting each state's legal regime and sovereignty. Another plea in support of a framework convention is that it could also capitalize on the efforts already invested into implementing the UNGPs and it could integrate its mechanisms, particularly the National Action Plans that receive growing attention from all stakeholders. This could also ensure policy coherence as the Guiding Principles' teaching virtue would allow for standard and concept harmonization of hard norms.

The option of a framework convention is similarly criticized as many consider it to be the newest '*distraction from effective change that is required to stop corporate impunity*".[59] Its opponents argue that it would be a waste of resources since much has already been vested into the negotiations. In addition, legitimate concerns are raised on knowing if the main purpose of a LBI could successfully be conducted within a framework setting. The answer would require a sharp determination of its goal and its scope, as touched up above.

4 A way forward

Beyond technical issues, the historical glimpse into the successive attempts to regulate businesses in human rights starkly demonstrate how it all comes down to political will. Both blocks need to work towards a compromise for the Draft Legally Binding Instrument to reach support from a critical mass of States across regions, that would trigger both adoption and compliance.

The format of the treaty might be of a lesser importance if the goals set forth in the mandate of the intergovernmental group are reached . If a treaty was to be formulated without reasonable chance of its entry into force, it would occupy a vital space in the field. Even if ratified, its effectivity would significantly diminish without support, and mass reservations could incur, as it happened for the Convention on the Protection of Migrant Workers and Members of their Families that was ignored for political reasons.[60] Nonetheless, it would be redundant and economically inefficient to adopt an emptied text with yet again soft norms

59 KINDA, Mohamadieh. *Negotiating business and human rights treaty: important steps forward yet a long way still to go*, Third World Network, 2021. [online]. Available at: <https://www.twn.my/title2/unsd/2021/unsd211101.htm>.

60 DESMOND, Alan (ed.). *Shining new light on the UN Migrant Workers Convention*. Pretoria University Law Press, 2017.

Published by Palacký University Olomouc, Czech Republic, 2022.
ISSN (print): 1213-8770; ISSN (online): 2464-6601

that would only add to the clutter of the all existing initiatives without effectively offering strong remedies for human rights abuses. Analogically, the Western countries should not reject the current Third Draft as a matter of principle and should further specify the 'alternative solutions' that could be considered.

Real efforts need to be put into bridging the North-South divide by shifting the perception of the stakeholders during the treaty-making process. In this context, a decision of the Chair of the Working Group to entertain a 'Friends of the Chair' group, composed from Ambassadors in Geneva, to facilitate further work on the treaty to ensure the cross regional support, including through convening consultations among States during inter-sessional period, may be a step into right direction. Such format may contribute to a discrete change of dynamics and assist in bringing on table a more consensual draft proposal to be discussed in upcoming years.

List of References

BECKERS, Anna. From Corporate Personality to Corporate Governance. The Transformation of International Human Rights Protection in Corporate Governance Structures. in BHUTA Nehal, VALLEJO Rodrigo (eds). *Human Rights and Global Governance*. Oxford University Press, Oxford, 2020. Also [online]. Available at: <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3573755>.

BERNAZ Nadia. Clearer, Stronger, *Better? – Unpacking the 2019 Draft Business and Human Rights Treaty*. 2019. [online]. Available at: <http://rightsasusual.com/?p=1339>

BERNAZ, Nadia, *Business and Human Rights. History, Law and Policy – Bridging the Accountability Gap:* Routledge, 2017, pp. 81–83.

DE SCHUTTER, Olivier. Towards a New Treaty on Business and Human Rights. *Business and Human Rights Journal*, 2016, vol 1, no. 1, pp. 41–67. DOI: https://doi.org/10.1017/bhj.2015.5.

DESMOND, Alan (ed.). *Shining new light on the UN Migrant Workers Convention.* Pretoria University Law Press, 2017.

DEVA Surya, BILCHITZ David (eds). *Human Rights Obligations of Business: Beyond the Corporate Responsibility to Respect?* Cambridge, Cambridge University Press, 2013, pp. 58–77 and pp. 78–104.

Group of 77, *Comment on behalf of the Group of 77 and China by Ambassador Byron Blake, Deputy Permanent Representative of Jamaica to the United Nations, at the session of the second committee of the General Assembly on "the role of the private sector in achieving the MDGs", New York, 17 November 2005*. [online]. Available at: <http://www.g77.org/Speeches/111705.htm> Accessed: 27.03.2022.

HAMM, Brigitte. The Struggle for Legitimacy in Business and Human Rights Regulation—a Consideration of the Processes Leading to the UN Guiding Principles and an International Treaty. Human Rights Review, 2021. vol. 23. no. 1. https://doi.org/10.1007/s12142-020-00612-y.

KINDA, Mohamadieh. *Negotiating business and human rights treaty: important steps forward yet a long way still to go*, Third World Network, 2021. [online]. Available at: <https://www.twn.my/title2/unsd/2021/unsd211101.htm>.

Published by Palacký University Olomouc, Czech Republic, 2022.
ISSN (print): 1213-8770; ISSN (online): 2464-6601

MARES, Radu. The United Nations Draft Treaty on Business and Human Rights. Forthcoming in MARX, VAN CALSTER, WOUTERS (eds), *Research Handbook on Global Governance, Business and Human Rights* (Edward Elgar, 2022). http://dx.doi.org/10.2139/ssrn.3964852.

MARES, Radu. *Three baselines for business and human rights*. 2017. [online]. Available at: <https://lucris.lub.lu.se/ws/portalfiles/portal/34400601/Three_baselines_for_business_and_human_rights.pdf> Accessed: 22.03.2022.

O'BRIEN METHVEN Claire, FERGUSON John , MCVEY Marisa. National Action Plans on Business and Human Rights: an Experimentalist Governance Analysis. *Human Rights Review,* 2021. https://doi.org/10.1007/s12142-021-00637-x.

O'BRIEN METHVEN, Claire. Submission to UN Open-ended Inter-Governmental Working Group on Transnational Corporations and Other Business Enterprises with Respect to Human Rights, For a business and human rights treaty based on progressive national implementation of the UNGPs and modelled after WHO Framework Convention on Tobacco Control.

O'BRIEN METHVEN, Claire. *The 2020 Draft UN Business and Human Rights Treaty– Steady Progress Towards Historic Failure*. BHR Symposium, International Commission of Jurists. 2020. [online]. Available at: <http://opiniojuris.org/2020/09/11/bhr-symposium-the-2020-draft-un-business-and-human-rights-treaty-steady-progress-towards-historic-failure/>.

OHCHR. Legally Binding Instrument to Regulate, In International Human Rights Law, The Activities of Transnational Corporations and Other Business Enterprises. All official documents [online]. Available at: <https://www.ohchr.org/en/hr-bodies/hrc/wg-trans-corp/igwg-on-tnc>.

PETERS Anne, GLESS Sabine, THOMALE Chris, WELLER Marc-Philipe. *Business and Human Rights: Making the Legally Binding Instrument Work In Public, Private And Criminal Law.* MPIL Research Paper Series no. 2020-06; KRAJEWSKI Markus. *Analysis of the Third Draft of the UN Treaty on Business and Human Rights Prof.* October 2021. CISDE. [online]. Available at: <https://www.cidse.org/2021/10/20/analysis-of-the-third-draft-of-the-un-treaty-on-business-and-human-rights/>.

RUGGIE, John G. The Past as Prologue? A Moment of Truth for UN Business and Human Rights Treaty. 08 July 2014. [online]. Available at: <https://www.hks.harvard.edu/sites/default/files/centers/mrcbg/programs/cri/files/Treaty_Final.pdf>.

SAUVANT, Karl P. The Negotiations of the United Nations Code of Conduct on Transnational Corporations. *The Journal of World Investment and Trade*, 2015, no. 16, pp. 17.

SIATITSA, Ilia Maria. The Evolution of the Monitoring Mechanism of the Framework Convention for the Protection of National Minorities: Co-operation of Independent and Political Bodies in the Interest of Effectiveness. *Revue Hellénique de Droit International*, 2010, Vol. 63, 771.

URIBE Daniel, DANISH, *Designing an International Legally Binding Instrument on Business and Human Rights*, South Center, July 2020, [online]. Available at: https://www.southcentre.int/sc-publication-july-2020/#more-14658.

WEISSBRODT, David. UN Perspectives on "Business and Humanitarian and Human Rights Obligations". *Proceedings of the ASIL Annual Meeting*, vol. 100, 2006, pp. 135–139. DOI: https://doi.org/10.1017/S027250370002406X.

Published by Palacký University Olomouc, Czech Republic, 2022.
ISSN (print): 1213-8770; ISSN (online): 2464-6601